NOT DESIGNATED FOR PUBLICATION

No. 92,504

IN THE COURT OF APPEALS FO THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

CONNIE M. JONES,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; Rebecca L. Pilshaw, judge. Opinion filed July 1, 2005. Appeal sustained.

Boyd Isherwood and *Lesley A. Isherwood, assistant district attorney,* Nola Foulston, district attorney, and *Phill Kline,* attorney general, for appellant.

Mark Sevart, of Derby, for appellee.

Before RULON, C.J., GREENE, J., and KNUDSON, S.J.

Per Curiam: The State of Kansas appeals the district court's dismissal of . . charge of driving under the influence of alcohol (DUI) and related charges against Connie M. Jones, based on double jeopardy consideration, after granting Jones' motion for new trial due to multiple errors in her first trial. The State argues that because there was no prosecutorial misconduct, the mere granting of a new trial to the defendant

does not implicate double jeopardy. We agree with the State and sustain the appeal.

Factual and Procedural Background

Jones was charged and tried for failure to maintain a single lane, transporting an open container, and DUI. During the trial, the State introduced evidence of a breath test taken after Jones was arrested. Jones timely objected to introduction of that evidence fo lack of foundation, but the trial court overruled the objection and the breathalyser results were admitted into evidence. A the conclusion of the trial, the jury returned a verdict of guilty on each charge.

Prior to sentencing, Jones filed a motion for acquittal and a motion for a new trial. In the motions, Jones argued the trial court improperly admitted the breathalyser results because the State failed to comply with K.S.A. 8-1001(f), resulting in a ack of foundation, K.S.A. 8-1001(f) requires the State to produce either the DC-27 or DC-70 form, which prove that a defendant was properly advised of his or her implied consent rights set forth under that section before the breath test is administered. The State failed to produce those forms at trial, and thus there was insufficient foundation to admit the breathalyser test.

The trial court held a hearing on the matter, at which the State advised the court it had the forms but simply erred at trial in failing to offer the forms into evidence prior to inquiring about the breathalyser test results. Jones argued that improper introduction of the breathalyser test results tainted the entire trial, thus warranting a new trial. The trial court agreed with Jones and ordered a new trial.

Prior to the second trial, Jones filed a motion to dismiss on the grounds that a second prosecution would violate the

Double Jeopardy Clauses of the Kansas and United States Constitutions. The trial court agreed and dismissed the charges against Jones with prejudice. In dismissing the case, the trial court asked rhetorically, "[I]s it fair that the defendant should be prejudiced by the State getting a second bite at the apple of getting in evidence that it failed to get in--that it failed to get in the first time?" The trial court went on to state, "[T]hat has never been the rules under which we play. It's often not fair to the State, but the State is not the one who is perhaps losing their liberty or whatever–I mean, that's our Constitution and the way it works." Upon inquiry by the prosecutor, however, the court expressly stated that it made no finding of prosecutorial misconduct.

The State timely filed this appeal.

Did the District court Err in Granting Defendant's Motion to Dismiss Due to Double Jeopardy Considerations?

> "Whether a retrial is barred due to double jeopardy is a question of law subject to de novo review. [Citation omitted.]" *In re Habeas Corpus Petition of Minnis*, 29 Kan. App. 2d 644, 646, 29 P.3d 462 (2201), *rev. denied* 273 Kan. 1075 (2002).

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same [offense] to be twice put in jeopardy of life or limb." Such double jeopardy protection is applicable to the States though the Fourteenth Amendment to the United States Constitution. Similar protection against double jeopardy is also provided in the Kansas constitution Bill of Rights § 10.

It is well established that double jeopardy is not implicated solely by the need for a second prosecution due to the defendant's motion for new trial. K.S.A. 21-3108 addresses

the effect of former prosecutions, providing in relevant part:
"(4) A prosecution is not barred under this section:

"(c) If subsequent proceedings resulted in the invalidation, setting aside, reversal or vacating of the conviction, unless the defendant was adjudged not guilty."

Our appella e courts have consistently held that there are generally no double jeopardy implications to a second prosecution for the same offense when an initial conviction has been invalidated at the behest of the defendant. In Kansas, "[a]n accused waives his right to plead double jeopardy when after conviction he applies for and is granted a newt rial." *State v. Bloomer*, 197 Kan. 668, 675, 421 P.2d 58 (1966), *cert. Denied* 387 U.S. 911 (1967). Further, "when a new trial is granted on the motion of the defendant in a criminal prosecution, the granting of the same places the party accused in the same positio. as if no trial had been and. [Citations omitted.]" *State v. Osburn*, 216 Kan. 638, 6410-42, 533 P.2d 1229 (1975).

The only recognized exception to this general rule is for the narrow circumstances of prosecutorial misconduct described in *Oregon v. Kennedy*, 456 U.S. 667, 72 . Ed. 2d 416, 102 S.. Ct. 2083 (1982), and embraced by our Supreme Court in *State v. Much*, 262 Kan. 459, 467, 939 P.2d 896 (1997). *Kennedy* requires intent by the prosecutor to provoke the defendant into moving for a mistrial; the test has been articulated as:

"[A] defendant should be allowed to freely choose whether to request a mistrial and forego the right to have the matter decided by the first trier of fact. Where the prosecutor seeks to force the defendant into a choice, the is not freely made and the prosecutor has subverted the defendant's a rights protected by the double Jeopardy Clause[s] of the constitution. Here if the defendant was forced into requesting a mistrial by the

prosecutor's intentional misconduct, retrial would be barred by K.S.A. 21-3108(1)(c) and by the Double Jeopardy Clause of the Kansas and United States Constitutions." *State v. McClanahan*, 259 Kan. 86, 102, 910 P.2d 193 (1996).

"Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause....Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Muck*, 262 Kan. At 470 (quoting *Kennedy*, 456 U.S. at 675-76).

Although Jones argues that *Kennedy* exception applies here due to the prosecutor's acts in intentionally offering evidence without the proper statutory foundation, both *Kennedy* and *Muck* for a supplemental finding in this regard, no such remand is appropriate here because the district court expressly declined to find that there had been prosecutorial misconduct. In the absence of *any* misconduct by the prosecutor, we certainly cannot conclude that the *Kennedy* exception has been met.

We conclude that the district court erred in dismissing the charges against Jones. There are no double jeopardy implications in this case to a second prosecution for the same offenses due to the absence of prosecutorial misconduct specifically intended to provoke the defendant's motion for new trial.

Appeal sustained.

Supreme Court Order District Case No. 02 TR 16297 SG

IN THE SUPREME COURT

OF THE STATE OF KANSAS

Mark A. Sevart
111 North Baltimore
Derby, KS 67037

Case No. 04-92504-A

State of Kansas, Appellant,
V.
Connie M. Jones, Appellee.

Your are hereby notified of the following action taken by the court:

Petition for review by Connie M. Jones.

Considered by the Court and Denied.

Dated: 10/11/2005.

Carol G. Green
Clerk